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IN THE

Supreme Court of the United States

October Term, 1955

No.

PRODUCTIVE INVENTIONS, INC., a corporation, *Petitioner*,

v.

TRICO PRODUCTS CORPORATION, a corporation, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Productive Inventions, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on July 20, 1955.

OPINIONS BELOW

The unreported opinion of the District Court is printed at page 3 of the separate Appendix.[1] The opinion of the Court of Appeals, appended to this petition (*infra* 1a), is reported at 224 F. 2d 678.

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[1] The separate Appendix, as used in the court below, is hereafter cited as (App).

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1955 (*infra*, 4a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Section 4 of the Clayton Act confers a right of action for treble damages upon "any person ... injured in his business or property by reason of anything forbidden in the antitrust laws." Is a patentee who licenses rather than manufactures patented devices precluded as a matter of law from maintaining an action under this Section for injury resulting from the foreclosure and attempted foreclosure of the market by the admitted antitrust violations of a manufacturer of competing devices?

Or, as stated by the Court of Appeals for the Second Circuit,

> "Is a patentee who has granted to another an exclusive license for the term of the patent, upon a royalty basis, a 'person * * * injured in his business or property' (within the meaning of Section 4 of the Clayton Act) so as to enable him to recover treble damages for loss of royalties on sales that might have been made by its licensee save for the anti-trust violations of defendant?"

STATUTE INVOLVED

Act of October 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U.S.C.A. § 15 (1951).

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an

agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT

Petitioner Productive Inventions, Inc. (hereinafter called Productive), plaintiff below, is engaged in the business of developing, patenting and licensing inventions on windshield wiper devices[2] for motor vehicles. Respondent Trico Products Corporation (hereinafter called Trico), defendant below, manufactures and sells windshield wiper devices and also, in the words of the Court of Appeals, "engages in some experimental work and has an interest in certain patents on the devices it markets" (*infra* 2a). The Anderson Company (hereinafter called Anco), a plaintiff below but not a party to this proceeding, manufactures and sells windshield wiper devices embodying Productive's inventions as exclusive licensee under its patents (App 10).

On March 26, 1953, Productive and Anco jointly brought an action to recover damages for, and to enjoin antitrust violations (Count I) and patent infringement (Count II) by respondent Trico (App 4). The antitrust complaint alleged that Trico had, in violation of Section 3 of the Clayton Act, sold and entered into contracts of sale of windshield wiper devices on condition that purchasers would not deal in competing devices, including those manufactured by Anco under Productive's patents (App 10). The complaint also

[2] The windshield wiper devices, or "components," involved in this litigation are defined in the complaint as "the motor, the blade, the arm, and the linkage assembly" (App. 5).

alleged that Trico had, in violation of Section 2 of the Sherman Act, attempted to monopolize and had monopolized interstate commerce in the manufacture and sale of windshield wiper motors, arms and blades (App 10). In particular, it was charged that Trico furthered these violations by, among others, (1) falsely representing to customers and potential customers that Anco's windshield wiper devices embodying Productive's inventions infringed Trico patents, (2) filing patent applications on inventions which Trico knew had long been in the public domain, (3) filing patent applications on inventions to which Trico knew Productive and Anco had lawfully acquired prior rights, for the purpose of using such applications as a basis for instituting harassing and delaying interference proceedings, and (4) instituting harassing and groundless patent infringement suits involving devices manufactured by Anco under licenses from Productive (App 11-14). Finally, the complaint alleged that had the sale of devices manufactured by Anco under exclusive licenses from Productive not been restrained by the unlawful activities of Trico, Anco would have sold additional windshield wiper devices and Productive would have received additional royalties on the sale of such devices (App 15). As a direct and proximate result of Trico's unlawful activities, Productive alleged damages in the sum of $396,373.40 (App 15) and prayed for treble that amount (App 16).

On May 7, 1954, Trico moved for summary judgment against Productive as to Count I on the ground that Productive was not injured in its business or property within the meaning of the antitrust laws

(App 25). The District Court granted the motion (App 3), dismissed Productive's complaint (App 2) and filed the certificate as to finality of judgment required by Rule 54(b) of the Federal Rules of Civil Procedure (App 2a). The Court of Appeals affirmed (*infra* 1a).

REASONS FOR GRANTING THE WRIT

1. This case presents a substantial question of federal law, never decided by this Court, involving the administration of the antitrust statutes and the right of patentees to invoke the protection of those statutes. The particular provision concerned—Section 4 of the Clayton Act (15 U.S.C.A. § 15)—is the basic statute under which all private antitrust treble damage actions must be brought. It says simply that any person whose business or property is injured by reason of antitrust violations may sue for treble damages. This case, in particular, sharply and formidably poses the question of properly defining the scope of Section 4 as it relates to patentees. Arising on a motion for summary judgment, it is untainted by factual issues or alternative grounds which so often becloud the presentation of otherwise important matters.[3] The undisputed or, for purposes of the motion, conceded facts here include:

a. Violations of the antitrust laws by respondent—an integrated patentee-manufacturer of windshield wiper devices.

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[3] E.g. *Harrison* v. *Paramount Pictures, Inc.*, 115 F. Supp. 312 (E.D. Penna.), affirmed 211 F. 2d 405 (CA 3), cert. denied 348 U.S. 828, where the jury verdict was adverse to plaintiff, and the court conceded that its ruling that plaintiff lacked standing under Section 4 was dictum.

b. Injury to petitioner—a patentee of competing devices—attributable solely to the acts of respondent.

c. Literal compliance by petitioner with all terms of Section 4.[4]

d. Absence of any alternative or derivative remedy by petitioner against respondent.

Despite these elements, the court below held that the patentee was precluded as a matter of law from maintaining its action under Section 4 for the damages resulting from respondent's foreclosure of the market for patented devices.

The significance of the ruling below to patentees who license rather than manufacture their inventions is awesome. It means that the antitrust laws will no longer protect their sole source of income—that restraints may be leveled against their business and property with impunity. In the typical case, with which this petition deals, the patentee's income is almost[5] wholly dependent upon sales of the product embodying his patent. When the patentee's invention is fabricated by his licensee and enters the market for competing devices, a fixed portion (e.g. 3%) of the price at which each and every device is sold belongs directly to the pat-

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[4] Productive, being a corporation, is a "person" within the meaning of 15 U.S.C.A. § 12. And diminution or cutting off of a patentee's royalty income, being damage "in the money of the plaintiff," is injury to "business or property." *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 397.

[5] In this case, for example, a fixed minimum royalty was provided for in the license agreement. As conceded by respondent, however, this minimum has during all of the relevant period been greatly exceeded (App 29).

entee. If sales of the patented device are unlawfully restrained, the patentee's royalties and the manufacturer's profits are each concomitantly restrained. The manufacturer, to be sure, may bring an antitrust suit to recover his lost profit; he may not, however, as the court below observed (*infra* 4a n. 1), include the royalties he would owe to the patentee in his quantum of recovery. As to a manufacturer, royalties payable are mere cost. Only the patentee can claim injury for the extent to which the sales restrained would have produced royalty revenue. Yet if the decision below is permitted to stand, this sum will be recoverable by no one.

The court below based its decision on the theory that a patentee's injury is "incidental" and "remote." But as indicated above, one who monopolizes or otherwise restrains commerce in a patented product injures both the patentee and the licensee-manufacturer simultaneously and at the identical point: the lost sale. No distinction in substance exists between these joint victims in terms of the directness or remoteness of their respective injuries. The distinction announced by the court below is based upon form alone. If Productive and Anco were, like Trico, an integrated corporation which both patented and manufactured windshield wiper devices, such corporation could undoubtedly recover, as the measure of its lost profit on sales Trico restrained it from making, the difference between its gross revenue on lost sales and the costs attributable to such sales. In such a situation, "costs" would include no royalties payable to others, and the integrated corporation's quantum of recovery would embrace profit on both patenting and manufacturing. Thus, a decision disqualifying the

unintegrated patentee as "remote" unjustifiably, and without apparent reason, diminishes the defendant's normal liability and excludes one of the two equally injured parties from all relief. The decision below thus creates precisely the situation which the Ninth Circuit in *Karseal Corporation* v. *Richfield Oil Corporation*, 221 F. 2d 358, avoided in dealing with the manufacturer-distributor relationship. "It tells" a patentee "that he may have the protection of the antitrust laws in private litigation if he" manufactures patented products himself, "and not have such protection if he decides to contract with a" person who will manufacture them for him. Cf. 221 F. 2d at 364-5.

Common law principles applied by this Court also refute the "remote" label pinned on the patentee below. Productive's claim does not concern *unintended* injuries *negligently* inflicted upon manufacturer Anco by a defendant "who knew nothing" of Productive's patents. Cf. *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303. Rather, the complaint charges Trico with the *intentional* commission of acts, forbidden by the antitrust laws, designed to depreciate and injure Productive's patents and eliminate sales of products licensed thereunder. See page 4 *supra*. Injuries sustained under such circumstances have long been considered to be proximately caused by the defendant's wrongful actions and have therefore been held remediable at common law. Cf. *Angle* v. *Chicago, St.P.M.& O.R. Co.*, 151 U.S. 1.

By excluding admittedly injured persons from recovering against admitted wrongdoers for intentional conduct which was the sole cause of the injuries sustained, the decision below patently departs from the plain language of the statute. Moreover, it is not in

accord with the applicable principles articulated by this Court. In *United States* v. *National City Lines, Inc.*, 334 U.S. 573, 581, this Court stated that the Clayton Act was intended by Congress "to provide broader and more effective relief, both substantively and procedurally, for persons injured by violations of its antitrust policy." And in *United States* v. *Cooper Corporation*, 312 U.S. 600, 605, this Court carefully enunciated the rule of interpretation governing the language of Section 4[6] of the Clayton Act:

> "Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction."

The importance of the question petitioner here presents is magnified by the difficulty lower federal courts have long experienced in interpreting Section 4. The tests they have formulated for discerning eligible plaintiffs include, among others:

a. His injury must not be "derivative."[7]

b. His injury must not be "indirect," "remote," "consequential" or "incidental."[8]

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[6] The language was then contained in Section 7 of the Sherman Act which has since been repealed (Public Law 135, 84th Cong.) because it was encompassed by Section 4 of the Clayton Act.

[7] E.g. *Peter* v. *Western Newspaper Union*, 200 F. 2d 867 (CA 5).

[8] E.g. *Loeb* v. *Eastman Kodak Co.*, 183 Fed. 704 (CA 3).

c. "He is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry."[9]

d. The antitrust violations must not only "hit" him but also be "aimed at" him.[10]

Under these tests, lower courts have divided on the standing to sue of landlords[11] and of patentees.[12] In addition, their applications of these tests have resulted in holdings that corporate stockholders,[13] cred-

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[9] *Conference of Studio Unions* v. *Loew's Inc.*, 193 F. 2d 51, 54-5 (CA 9), cert. denied 342 U.S. 919.

[10] *Karseal Corporation* v. *Richfield Oil Corporation*, 221 F. 2d 358, 362 (CA 9).

[11] Compare *Harrison* v. *Paramount Pictures, Inc.*, 115 F. Supp. 312 (E.D. Penna.), affirmed 211 F. 2d 405 (CA 3), cert. denied 348 U.S. 828, with *Camrel Co., Inc.* v. *Paramount Film Distributing Corp.*, CCH Trade Cases, Par. 57,233 (S.D.N.Y. 1944).

[12] Compare decision below with *La Chapelle* v. *United Shoe Machinery Corp.*, 90 F. Supp. 721 (D. Mass.). And see *Rossman* v. *Pullman Co.*, 15 F. Supp. 325 (S.D.N.Y.), which the court below did not discuss and in which the district court had ruled against the plaintiff patentee's claim solely because of evidential deficiencies:

> "There is no evidence that any other person was ready, able, and willing to make, use, or sell, under license from her, any of the alleged patented improvements. There is no evidence that she submitted these patents indeed to the Pullman Company or the Pullman Manufacturing Company, or to any company engaged in the manufacture, use, or sale of sleeping cars or their equipment."

[13] E.g. *Peterson* v. *Borden Co.*, 50 F. 2d 644 (CA 7).

itors[14], and officers[15] may not sue, unless their injury is distinct from that of the corporation;[16] and that employees may not sue,[17] unless they are commissioned salesmen.[18] These distinctions, however, failed to impress the court below, for it ruled against the patentee despite the facts that (1) its injury was distinct from that of its licensee and (2) its royalty income was, like that of commissioned salesmen, geared to each individual sale of the manufacturer's product. Just as in the case of commissioned salesmen, the mere fact that the patentee's injury is *measured by* the manufacturer's lost sales does not make it indirect. It is the directness of the *injury*, not of its *method of measurement*, that constitutes the test of standing.

The morass of doctrines and confused pattern of results make it small wonder that the District Court in *Harrison* was compelled to observe that the decisions "are far from being in accord or establishing any clearly defined rule." 115 F. Supp. at 317. Only this Court can resolve the confusion which 50 years of lower court struggles with Section 4 have produced.

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[14] E.g. *Loeb* v. *Eastman Kodak Co., supra.*

[15] E.g. *Corey* v. *Independent Ice Co.*, 207 Fed. 459 (D. Mass.)

[16] E.g. *Ames* v. *American Telephone and Telegraph Co.*, 166 Fed. 820 (D. Mass.) and *Peter* v. *Western Newspaper Union, supra*, at 872.

[17] E.g. *Gerli* v. *Silk Ass'n. of America*, 36 F. 2d 959 (S.D.N.Y.).

[18] E.g. *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F. 2d 416 (CA 10), cert. denied 344 U.S. 837; *McWhirter* v. *Monroe Calculating Mach. Co., Inc.*, 76 F. Supp. 456 (W.D. Mo.); *Vines* v. *General Outdoor Advertising Co., Inc.*, 171 F. 2d 487 (CA 2); *Roseland* v. *Phister Mfg. Co.*, 125 F. 2d 417 (CA 7); and *Klein* v. *Sales Builders, Inc.*, CCH Trade Cases, Par. 62,600 (N.D. Ill. 1950).

And only this Court can restore to patentees their right to protection under the antitrust laws.

2. The decision of the court below conflicts in principle with that of the Court of Appeals for the Ninth Circuit in *Karseal Corporation* v. *Richfield Oil Corporation,* 221 F. 2d 358. Karseal, a manufacturer of car wax, was engaged in selling its wax to various independent distributors. The distributors, in turn, resold the wax to independent service stations. Richfield, a manufacturer of petroleum products but not of wax, sponsored certain auto accessories including car waxes produced by parties other than Karseal. Richfield sold and distributed such waxes to independent service stations. The gist of the complaint was that Richfield, by exclusive dealing arrangements with the independent service stations in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act, foreclosed such stations to the distributors who had bought wax from Karseal; this in turn resulted in a decrease of the distributors' purchases from Karseal. As stated by the Court of Appeals:

> "The action is brought by Karseal, who it is alleged, was the manufacturer of a wax, selling to independent distributors, who in turn were prevented or impeded in selling it to the 2965 independent Richfield service stations by reason of Richfield's illegal practices in violation of the antitrust laws." 221 F. 2d at 362.

The Ninth Circuit allowed Karseal to maintain its action despite the fact that it had no direct dealings in the market place where the restraints were applied—i.e. the independent service stations.

The parallel between the claims of Karseal and Productive is striking. In each instance the restraints

on sales occur at the independent service station level, where neither plaintiff has any "direct" or "face to face" business dealings and where car wax and windshield wipers both are retailed to the consumer. Instead, in each instance the plaintiff is one step removed from the point where restraints are applied: Karseal sells wax to distributors who, competing with Richfield, are the parties restrained from selling wax to service stations; Productive licenses patent rights to Anco who, competing with Trico, is the party restrained from selling the patented devices to service stations. In two respects Productive's case is factually more compelling than Karseal's: (1) Karseal sells its products *outright* to the independent distributor, whereas Productive does not; it retains a royalty interest in the ultimate sale of each patented device. (2) Richfield is not a competitor of Karseal in the manufacture of wax, whereas Productive and Trico do compete in the development and patenting of windshield wiper inventions. As alleged in the complaint, Trico harassed, interfered with and made false representations concerning Productive's inventions and patents in furtherance of its scheme to monopolize the windshield wiper industry.

Despite these elements of similarity, the Second Circuit—to whom the recently-decided *Karseal* was cited on oral argument—declined to follow or mention the Ninth Circuit's case and arrived at its contrary conclusion. The contrast between these cases affords an additional reason for this Court's grant of certiorari. It demonstrates graphically the uncertainty and disorder which prevail in the administration of the statute which must open or bar the door to relief from antitrust violations.

CONCLUSION

For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,

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Of Counsel

Opinion of the Court Below

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 276 October Term, 1954

Argued June 7, 1955 Decided July 20, 1955

Docket No. 23461

PRODUCTIVE INVENTIONS, INC., a corporation, *Appellant*,

v.

TRICO PRODUCTS CORPORATION, a corporation, *Appellee*.

Before CLARK, *Chief Judge*, CHASE, *Circuit Judge* and RYAN, *District Judge*.

Appeal from the United States District Court for the Western District of New York, John Knight, Judge.

Productive Inventions, Inc. appeals from a judgment entered on an order granting defendant's motion for partial summary judgment dismissing Count I of the complaint brought under the anti-trust acts, 15 U.S.C. §§ 2, 14, 15 and 26. Affirmed.

Herbert A. Bergson, and Daniel J. Freed, Washington, D. C. and David L. Landy, Buffalo, N. Y. (Bergson & Borkland, Washington, D. C. and Moot, Sprague, Marcy & Gulick, Buffalo, N. Y., on the brief), for appellant.

Raichle, Tucker and Moore, Buffalo, N. Y. (Frank G. Raichle and James O. Moore, Jr., on the brief), for appellee.

RYAN, D. J.

Plaintiff appeals from an order granting defendant's motion for partial summary judgment and from the judgment entered thereon dismissing Count I of its complaint against defendant Trico Products Corporation (Trico)

seeking treble damages for violation of Section 3 of the Clayton Act and Section 2 of the Sherman Act. The District Judge having made the required finding of finality under Fed. Rule 54(b), the appeal is properly before us.

Appellant is the patentee of certain patents on windshield wiper components for motor vehicles on which it granted an exclusive license to the Anderson Company ("Anco") to manufacture and sell under the patents. Appellant's sole interest in the patents is limited to its right to receive royalties on Anco's sales.

Appellee Trico is in competition with Anco in the manufacture and sale of windshield wipers and their components, and also engages in some experimental work and has an interest in certain patents on the devices it markets.

The count in the complaint with which we are concerned seeks treble damages alleging that appellant's royalties have been reduced by reason of Trico's selling its products upon condition that purchasers would not deal with Trico's competitors, including Anco. Judge Knight ruled that appellant had no standing to sue for treble damages because its loss was "beyond the limit of injuries cognizable under the anti-trust laws." We agree with this holding.

The limited question here presented is: Is a patentee who has granted to another an exclusive license for the term of the patent, upon a royalty basis, a "person ... injured in his business or property" (within the meaning of Section 4 of the Clayton Act) so as to enable him to recover treble damages for loss of royalties on sales that might have been made by its licensee save for the anti-trust violations of defendant? We hold he is not.

Those harmed only incidentally by anti-trust violations have no standing to sue for treble damages; only those at whom the violation is directly aimed, or who have been directly harmed may recover. As stated by the Ninth

Circuit in *Conference of Studio Unions* v. *Loew's Inc.*, 193 F. 2d 51, at p. 55:

> "Recovery and damages under the anti-trust law is available to those who have been directly injured by the lessening of competition and withheld from those who seek the windfall of treble damages because of incidental harm."

Shareholders and officers of corporations as well as creditors and landlords have been held not to have standing to sue for treble damages. *Loeb* v. *Eastern Kodak Co.*, 183 Fed. 704; *Gerli* v. *Silk Assn. of America*, 36 F. 2d 959; *Corey* v. *Boston Ice Co.*, 207 Fed. 465; *Westmoreland Abestos Co.* v. *Johns-Manville Corp.*, 30 F. Supp. 389, affd. 113 F. 2d 114. Undoubtedly, such persons suffer some financial loss when anti-trust violations are directed against the corporations in which they have an interest. But not every financial loss due to an anti-trust violation however remote, gives a right of action.

The situation here presented is akin to the cases above cited, and we think falls squarely within the rule denying relief for incidental damages. In *Harrison* v. *Paramount Pictures Inc.*, 115 F. Supp. 312, affd. 211 F. 2d 405, the owner of a theatre had leased it under a guaranteed rental plus a percentage of the profits derived from its operation. The owner brought a treble damage suit claiming diminution in rental because of defendants' conspiracy to deny profitable pictures to the theatre. Judge Kirkpatrick, in a reasoned opinion that was accepted by the Third Circuit, ruled that the owner had no "right" to increased rentals by the showing of first-run pictures, but only a "hope" that such pictures would increase the theatre's income. Thus, any financial loss suffered by the plaintiff was only incidental to the acts complained of. Here, too, the appellant has no standing under the anti-trust laws to complain of the incidental loss of royalties by activities of Trico, not directed at it.

No hard and fast rule can be laid down in these situations as the line between direct and incidental damage is not always definable with clarity. All we here determine is that under the facts pleaded appellant has no right to recover treble damages.[1]

Affirmed.

Judgment of the Court Below

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of July one thousand nine hundred and fifty-five. Present:

HON. CHARLES E. CLARK, *Chief Judge,*

HON. HARRIE B. CHASE, *Circuit Judge,*

HON. SYLVESTER J. RYAN, *District Judge,*

PRODUCTIVE INVENTIONS, INC., *Plaintiff-Appellant,*

v.

TRICO PRODUCTS CORPORATION, *Defendant-Appellee.*

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

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[1] While we are not now called upon to decide, we must express considerable doubt as to two observations by Judge Knight in his opinion below: (1) if Anco recovers, it would be liable over to appellant for loss of royalties, and (2) recovery by appellant would "doubly enrich" the principal stockholder of Anderson (Anco). Neither observation seems to us to be valid as a matter of law.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk

By Ralph C. Curcio,
Deputy Clerk

FILED
DEC 27 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 472

PRODUCTIVE INVENTIONS, INC.,
Petitioner,

v.

TRICO PRODUCTS CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 472.

PRODUCTIVE INVENTIONS, INC.,
Petitioner,

v.

TRICO PRODUCTS CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Trico Products Corporation, respectfully submits its brief in opposition to the Petition of Productive Inventions, Inc. for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its order and judgment, dated July 20, 1955, affirming summary judgment against Petitioner as to Count I of the Complaint herein.

Questions Presented

1. Is a patent owner who granted to another on a royalty basis, an exclusive license to manufacture and sell under and for the full term of, all of his present and future patents, and who received royalties therefor exceeding the specified minimum, a "person * * * injured in his business or property" within Clayton Act § 4, so as to enable him to recover three-fold for royalties on sales lost by his exclusive licensee as a result of alleged anti-trust violations directed solely against licensee's business of manufacturing and selling?

2. May a patent licensor not engaged in the business of manufacturing or selling, maintain an action for treble damages under Clayton Act § 4 for royalties lost as an incidental result of alleged restrictive practices directed solely at the business of manufacturing or selling the patented articles carried on by the plaintiff's exclusive licensee?

Respondent's Statement of Case

This is an action brought by The Anderson Company (hereinafter called "Anco") and petitioner, Productive Inventions, Inc. (hereinafter called "Productive" or "petitioner") against Trico Products Corporation (hereinafter called "Trico") in the United States District Court for the Western District of New York. The complaint (App. 4-17)[1] contains two counts. The first count seeks treble damages under the anti-trust laws and the second count, which is not involved herein, complains of patent infringement.[2]

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[1] "App." refers to pages of the Appendix below.

[2] Count II is still pending as to Anco and petitioner.

Count I of the complaint (App. 4-15) alleged that Trico had violated Sherman Act, § 2 (15 U. S. C. A. § 2) and Clayton Act, § 3 (15 U. S. C. A. § 14) in its manufacture and sale of automotive windshield wiper components,[3] and seeks treble damages under Clayton Act, § 4 (15 U. S. C. A. § 15).

The First Count of the complaint asserts two separate and distinct claims for treble damages: one, a direct claim on behalf of Anco, and the other, a dependent and incidental claim on behalf of petitioner. The District Court (Knight, Ch. J.) dismissed petitioner's dependent claim under Count I of the complaint on the ground that petitioner was not a "person * * * injured in his business or property" within the meaning of Clayton Act § 4, in a decision of limited scope which stated:

> "Each case must be dealt with on its own facts. All that is decided here is that the loss of Productive Inventions, Inc., if any, is beyond the limit of injuries cognizable under the anti-trust laws." (App. 4.)

The United States Court of Appeals for the Second Circuit unanimously affirmed the dismissal of Count I in a similarly limited opinion, stating:

> "No hard and fast rule can be laid down in these situations as the line between direct and incidental damage is not always definable with clarity. All we here determine is that under the facts pleaded appellant has no right to recover treble damages." (Pet. App. 4 (a))[4]

Insofar as the claim against Anco is concerned, it is a traditional pleading in a civil antitrust case between competitors. It alleges that both Anco and Trico are engaged

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[3] Complaint Par. 6 (App. 5) defines "components" as: "the motor, the blade, the arm, and the linkage assembly connecting the motor to the arm, all of which together constitute elements of what is herein referred to as a 'windshield wiper assembly'."

[4] "Pet. App." refers to pages of the Appendix annexed to the petition for certiorari herein.

in competition in interstate commerce in the manufacture and sale of certain automotive windshield wiper components. (Complaint ¶ 20, App. 9; See also Pet. 3.)[5] It is alleged that Trico has attempted to monopolize, and has monopolized said alleged "interstate trade and commerce" in violation of Sherman Act § 2 (Complaint ¶ 25, App. 10-11); and that Trico has entered into contracts to sell and has sold such components upon the condition that the purchasers thereof would not deal in Anco's products, thereby restraining said alleged "interstate trade and commerce" in violation of Clayton Act § 3 (Complaint ¶ 24, App. 10).

Complaint Par. 26 (a-l) (App. 11-14) alleged 12 specific acts on the part of Trico, directed solely against Anco, which constituted violations of Sherman Act § 2 and Clayton Act § 3 as follows:

Complaint Par. 26 (a) (b) (c) and (d):

Threatened and actual refusal to sell components unless purchasers discontinued purchases of components from Anco "for the purpose of preventing the lawful competition of plaintiff Anco." (App. 11-12.)

Complaint Par. 26 (e) and (f):

Threatened price increases unless purchasers discontinued dealing in Anco's components. (App. 12.)

Complaint Par. 26 (g):

Exclusive sales contracts with the distributors of components. (App. 12.)

Complaint Par. 26 (h) and (k):

Made false representations to Anco's customers concerning: Anco's financial stability, quality of Anco's components, and Anco's infringement of Trico's patents, for the purpose of restraining the "lawful competition of plaintiff Anco". (App. 12-13.)

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[5] Pet. refers to pages of the Petition for Certiorari herein.

Complaint Par. 26 (i) and (l):

> Caused applications to be filed for non-patentable inventions for the purpose of monopolizing and discouraging competition by Anco in said "trade and commerce" and for the purpose of delaying the granting of Anco's patent. (App. 12-14.)

Paragraph 27 (a-l) then alleged 12 results of Trico's said acts, upon Anco. None of said results are alleged to have been visited upon petitioner, Productive. Paragraph 28 alone alleges (in conclusory form) petitioner's dependent and indirect claim, to wit: but for Trico's acts, Anco would have sold at a substantial profit additional components and petitioner Productive "would have received additional royalties". (App. 15.)

The second claim contained in Count I of the complaint relates to petitioner and is the subject of this petition. The complaint is practically barren of allegations with respect to petitioner and, in fact, makes no reference to the business or property of petitioner, as being the foundation of this million dollar treble damage claim. The entire substance of the allegations with respect to Productive is that it is the record owner of certain patents under which Anco has manufactured and sold "components" by virtue of an exclusive license agreement (App. 32-41) providing for royalty payments, and that it would have received additional royalties if Anco's sales had not been restrained by Trico's unlawful activities (Complaint ¶29, App. 15).

The complaint does not allege that petitioner and Trico are in competition or that petitioner is engaged in commerce. Petitioner Productive is only mentioned in four paragraphs of the complaint as follows:

> Complaint Par. 1—Allegation of residence of Productive. (App. 5.)

Complaint Par. 23—Allegation that Anco manufactured and sold "components", covered by patents issued to Productive under an exclusive license agreement. (App. 10.)

Complaint Par. 28—Allegation that but for Trico's unlawful activities Anco "would have sold at a substantial profit a large number of additional motors, arms and blades and plaintiff Productive would have received additional royalties". (App. 15.)

Complaint Par. 29—Allegation of damage suffered by Productive. (App. 15.)

The tenuous nature of petitioner's claim was made more apparent in the course of the taking of depositions of the principal officers of the plaintiff corporations. John W. Anderson, president of Productive and Anco, testified that Productive is a personal holding company (App. 44) and described Productive's business as follows:

> "Q. What is the business of Productive Inventions, Inc.?
>
> A. Productive Inventions conducts experimental and developmental work and, in a way, supervises the matter of patenting various inventions in which it has an interest." (App. 46.)

Petitioner's answering affidavits upon the motion for summary judgment stated:

> "Insofar as the present action is concerned, Productive is in the business of licensing patents on windshield wiper components". (App. 31.)

Under its exclusive license agreement with Anco (App. 32-41) petitioner has completely divested itself of all right to manufacture and/or sell components covered either by any patents which it owns, or by any future or improvement patents which it may develop, secure or acquire (App. 33, 34-35; 41). By the terms of said license, Anco agreed

to pay petitioner a royalty equal to 3%[6] of the net sales price of any device (App. 36). In the event that the royalties during any twelve consecutive calendar months are less than $12,000.00, the license may become non-exclusive (App. 40). It is conceded that this minimum of $12,000.00 was greatly exceeded (Pet. 6; App. 29, 43). The license further provides that in the event the royalties on any device are less than $1,000.00 in any twelve consecutive months, the licensor may elect to make the license non-exclusive. Apparently, this has never occurred (App. 29 & 40).

Reasons Relied On, In Opposition

A. Petitioner is remote and its injury, if any, indirect and consequential.

The petition presents no question which warrants the granting of a writ of certiorari. The decision sought to be reviewed is not one of general application or even of general interest. It is expressly limited to the case at bar. The only question decided by the Courts below was whether, under the facts of this case, this particular petitioner had any status to seek three-fold damages and attorney's fees under Clayton Act § 4. The Court of Appeals carefully pointed out the limitations of its decision stating:

> "No hard and fast rule can be laid down in these situations as the line between direct and incidental damage is not always definable with clarity. All we here determine is that under the facts pleaded appellant has no right to recover treble damages." (Pet. App. 4(a).)

The decision of the District Court was similarly limited:

> "Each case must be dealt with on its own facts. All that is decided here is that the loss of Productive In-

[6] The license has been orally modified on several occasions, and the royalty rate was reduced from 3% to 1% because of sharp competition encountered by Anco (App. 10, 31, 29, 46).

ventions, Inc., if any, is beyond the limit of injuries cognizable under the anti-trust laws." (App. 4.)

The facts before the court as set forth in the Statement, *supra*, show that petitioner, Productive, is a personal holding company (App. 44) whose sole business is that of "licensing patents on windshield wiper components" (App. 31, 46). Petitioner is not now, and cannot in the future be, in competition with Trico, or with any other manufacturer, patentee, or seller of automotive windshield wiper components. Under its exclusive license agreement with Anco, petitioner has completely divested itself of all rights, either to retain, to manufacture, to use or to sell under, and during the full life of, any present or after acquired patents (App. 33, 34-35, 41). Petitioner's claim herein is dependent and indirect, since it is based upon the assumption that if Anco's sales of components had not been restrained by Trico's alleged unlawful activities, directed against Anco, petitioner "would have received additional[1] royalties" (Complaint 28, App. 15).

There is nothing herein which necessarily inhibits the rights of a patent owner. True, he may be foreclosed from the bonanza of treble damages if he sees fit to transfer to others all rights under all of his patents. This does not necessarily mean, as claimed by petitioner, that there is an "absence of any alternative or derivative remedy by petitioner against Respondent" (Pet. 6). Perhaps, if Trico had invaded any of petitioner's legal rights, petitioner might have a right to seek actual, untrebled damages in the appropriate local forum protecting such rights.

Nor is petitioner's argument valid that its standing is created by the license agreement royalty provision granting it "a fixed portion (e. g. 3%) of the price at which each

[1] The exclusive license provided for a fixed minimum royalty plus a percentage royalty (App. 40, 36). It is conceded that the minimum stipulated royalty was greatly exceeded (Pet. 6; App. 29, 43).

and every device is sold" (Pet. 6). A line of liability drawn under this concept would create potential infinite liability. Petitioner here, being a corporation, is not the patentee, but the assignor. The actual individual patentee might then also have standing under a percentage royalty license with petitioner. Petitioner's supplier, landlord and requirements contractor might have standing to claim treble damages. As stated by Justice Holmes in Robins Drydock & Repair Co. v. Flint:[8]

"The law does not spread its protection so far."

B. Treble damages are not recoverable for remote or indirect injuries.

The Sherman Act[9] created new and extraordinary rights of limited availability.[10] The provisions of the Act were not unambiguous and the courts were "left to give content to the statute".[11] Thereafter and prior to the enactment of the Clayton Act,[12] treble damage relief under Sherman Act § 7 was consistently denied to all who were not directly aimed at and injured.[13] Recovery was allowed only where the unlawful acts directly affected the plaintiff.[14]

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[8] 275 U. S. 303 at 309; 72 L. ed. 290 at 292.

[9] Act of July 2, 1890, 26 Stat. 209.

[10] *U. S. v. Cooper Corp.*, 312 U. S. 600, 85 L. ed. 1071.

[11] *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 488-489, 84 L. Ed. 1311, 1320-1321.

[12] Act of October 15, 1914, 38 Stat. 731.

[13] *Loeb v. Eastman Kodak Co.*, (C. A. 3, 1910) 183 F. 704, 709 (shareholder and creditor)

"* * * the plaintiff did not receive any direct injury * * *. No conspiracy or combination against him as a stockholder or creditor is alleged. * * * Hence any injury which he, as a stockholder, received, was indirect, remote, and consequential".

United Copper Securities Co. v. Amalgamated Copper Co., (C. A. 2, 1916) 232 F. 574, 577. (Landlords and corporate officers and employees.)

Ames v. American Tel. & Tel. Co., (1909) 166 F. 820 at 823 (shareholder). "The only injury set forth is an injury to the corporation".

See also *Breed v. American Tel. & Tel. Co.* (1909) 166 F. 825;

Corey v. Independent Ice Co., (1913) 207 F. 459 (shareholder).

Corey v. Boston Ice Co., (1913) 207 F. 465 (corporate director and officer).

[14] *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390, 51 L. Ed. 241, affirming 127 F. 23, where a city pipe purchaser was held to be

(Footnote continued on following page.)

In 1914 Congress enacted the Clayton Anti-trust Act[15] and § 4 thereof[16] provided as follows:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the Anti-trust Laws * * * shall recover three-fold the damages by him sustained * * *."

Significantly, Clayton Act § 4 followed substantially the wording which previously appeared in Sherman Act § 7,[17] omitting the underscored words:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act * * * shall recover three-fold the damages by him sustained * * *."

Congress thus demonstrated its approval of judicial construction refusing treble damages to remotely and indirectly affected persons.

Thereafter the courts have consistently followed this interpretation and Congress has manifested its approval thereof by failing to legislate thereon despite other bills, amendments and/or additions to the anti-trust laws from time to time.[17a] Thus, the following plaintiffs have since been held to be remote and their injuries indirect: share-

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(Footnote continued from preceding page.)
injured under § 7 by conspiracy of pipe makers in *Addyston Pipe Co. v. U. S.*, 175 U. S. 211, 243, 44 L. Ed. 136, 148: "The combination thus had a direct, immediate, and intended relation to and effect upon the subsequent contract to sell and deliver the pipe. It was to obtain that particular and specific result that the combination was formed. * * *" cf. *Karseal Corp. v. Richfield Oil Corp.*, (C. A. 9, 1955) 211 F. (2d) 358.
Loeb v. Eastman Kodak Co., (C. A. 3, 1910) 183 F. 704, 711.
United Copper Securities Co. v. Amalgamated Copper Co., (C. A. 2, 1916) 232 F. 574, 577.

[15] Act of October 15, 1914, Chap. 623, 38 Stat. 730.

[16] 15 U. S. C. A. § 15.

[17] Repealed, effective Jan. 7, 1956, Act of July 7, 1955, Public Law 137, § 3, 69 Stat. 283.

[17a] See "Congress and the Monopoly Problem: Fifty Years of Antitrust Development: 1900-1950", House Document No. 599, 81st Congress, 2d Session; pp. 99-100; 35-97.

holders,[18] creditors,[19] corporate officers and employees,[20] landlords,[21] and patentees not engaged in manufacturing.[22]

Mr. Justice Stone succinctly summed this up in *Apex Hosiery Co. v. Leader*,[23] stating:

> "The long time failure of Congress to alter the (Sherman) Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one."

Where Congress has wished to alter the provisions of the anti-trust laws as interpreted by this court, it has not been reluctant so to do.[24]

This Court recently denied certiorari in *Harrison v. Paramount Pictures, Inc.*[25] where the following question was presented:

> "Whether the courts below erred in holding as a matter of law that the landlord-owner of a theatre, admittedly injured as a result of the *Paramount* conspiracy, nevertheless, has no standing as a private

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[18] *Peterson v. Borden Co.*, (C. A. 7, 1931) 50 F. (2d) 644;
Coast v. Hunt Oil Co., (C. A. 5, 1952) 195 F. (2d) 870.
Peter v. Western Newspaper Union, (C. A. 5, 1953) 200 F. (2d) 867;
Gerli v. Silk Ass'n. of America, (1929) 36 F. (2d) 959;
Westmoreland Asbestos Co. v. Johns Manville Corp., (1939) 30 F. S. 389.

[19] *Gerli v. Silk Ass'n. of America, supra.*

[20] *Westmoreland Asbestos Co. v. Johns Manville, supra;*
Gerli v. Silk Ass'n. of America, supra.

[21] *Westmoreland Asbestos Co. v. Johns Manville, supra;*
Harrison v. Paramount Pictures, Inc., 115 F. S. 312, aff'd. on opinion below 211 F. (2d) 405, cert. den. 348 U. S. 828.

[22] *Rossman v. Pullman Co.*, (1936) 15 F. S. 325.

[23] 310 U. S. 469, 488, 84 L. ed. 1311, 1320.

[24] See Amendment to the Clayton Act, by Act of July 7, 1955, Public Law 137, § 4A, 69 Stat. 283, which gave the United States the right to sue for "actual damages" where treble damages were denied the Government in *U. S. v. Cooper Corp.*, 312 U. S. 600, 85 L. ed. 1071.

[25] 348 U. S. 828. Opinion below, (C. A. 2, 1954) 211 F. (2d) 405, affirming, on opinion below 115 F. S. 312.

suitor, and his property rights fall outside the protection of the antitrust laws."[26]

Petitioner's argument to this Court in the *Harrison* case stated:

"The decisions of the courts below squarely present the question of whether the owner of a theatre is a 'person' within the meaning of the language of Section 7 * * *."[27]

Judge Kirkpatrick, in reliance upon the affirmance of his decision in the *Harrison* case, granted summary judgment in *Melrose Realty Co., Inc. v. Loews, Inc.*[28]

This Court also recently denied certiorari in *Conference of Studio Unions v. Loews, Inc.*,[29] where the Court of Appeals stated at pp. 54-55:

"A conspiracy may have many purposes and objects; the conspirators may perform an almost infinite variety of acts in furtherance of the conspiracy; but, in order to state a cause of action under the anti-trust laws *a plaintiff must show more than that one purpose of the conspiracy was a restraint of trade and that an act has been committed which harms him. He must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. Otherwise he is not injured 'by reason' of anything forbidden in the anti-trust laws.*

Such a construction is in accordance with the basic and underlying purposes of the anti-trust laws to preserve competition and to protect the consumer. Recovery and damages under the anti-trust law is available to those who have been directly injured by the lessening of competition and withheld from those who

[26] Harrison petition for certiorari, p. 3.

[27] Ibid. p. 32.

[28] CCH Trade Regulations Reporter, 68,150; Sept. 12, 1955.

[29] (C. A. 9, 1951) 193 F. (2d) 51, cert. den. 342 U. S. 919, 96 L. ed. 697. See also *Shatte v. International Alliance*, (C. A. 9, 1950) 182 F. (2d) 158.

seek the windfall of treble damages because of incidental harm." (Italics supplied.)

In contrast, in the recent case of *Karseal Corp. v. Richfield Oil Corp.*,[30] plaintiff manufactured but did not distribute car wax, and the defendant Richfield had entered into exclusive sales agreements with service station operators. The complaint incorporated the findings, conclusions of law and final judgment in *United States v. Richfield*,[31] where it was found that the unlawful practices "have had the necessary and intended effect of denying manufacturers and suppliers of * * * automotive accessories, competitive to those manufactured or sponsored by Richfield, access to a substantial number of potential outlets * * *." The Court, in the Karseal case, found that:

> "The impact was on the market * * * the illegal acts were directed against the manufacturers and distributors of the competing products, including Karseal's wax * * *. We conclude that Karseal under the alleged facts of this case is 'within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry' * * * that Karseal was within the target area of the illegal practices of Richfield; that Karseal was not only hit but was aimed at, by Richfield."[32]

Plaintiffs, seemingly remote, have been accorded standing where they were aimed at and hit: division of market reducing sales by exclusive sales agents;[33] transfer of advertising account from salesman to a competitor;[34] boycott of sales company's products;[35] violation of duty owed

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[30] (C. A. 9, 1955) 221 F. (2d) 358.

[31] 99 F. S. 280, aff'd. 343 U. S. 922, 96 L. ed. 1334.

[32] Ibid. pp. 364-365.

[33] *Roseland v. Pfister Mfg. Co.*, (C. A. 7, 1942) 125 F. (2d) 417.

[34] *Vines v. General Outdoor Advertising Co.*, (C. A. 2, 1948) 171 F. (2d) 487.

[35] *Kobe v. Dempsey Pump Co.*, (C. A. 10, 1952) 198 A. (2d) 416.

shareholder;[36] discounts intended to prevent sales;[37] and forcing patentee, to sacrifice patents.[38]

To disturb now this firmly established and long recognized legal principle and extend the punitive remedy of treble damages to any remote person who could make a showing of damage would result in chaos. Literally thousands of anti-trust cases have been settled for many millions of dollars and many other cases have been litigated and disposed of by final judgments. To now hold that separate and independent causes of action exist in favor of remote plaintiffs would cause a veritable deluge of new lawsuits seeking a treble windfall.[39] Multiplicity of actions would result and the liability created would extend beyond all practical limit.

Conclusion.

It is respectfully submitted that for the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

FRANK G. RAICHLE,
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[36] *Peter v. Western Newspaper Union*, (C. A. 5, 1953) 200 F. (2d) 867, 872.
[37] *McWhirter v. Monroe Calculating Machine Co.*, (1948) 76 F. S. 456.
[38] *LaChapelle v. United Shoe Machinery Corp.*, (1950) 90 F. S. 721.
[39] In some cases the statute of limitations has been tolled for many years pending the determination of a government action.